

Service Date: November 16, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF the PSC's Investigation)	UTILITY DIVISION
of the Regulatory Status of Other Common)	DOCKET NO. 94.2.8
Carriers and Contemplated Rulemaking. )	ORDER NO. 5778c

**ORDER ON MOTION FOR RECONSIDERATION**

I. Background

1. On March 9, 1994 the Montana Public Service Commission (Commission) initiated Docket 94.2.8 for the investigation of the regulatory status of other common carriers (OCCs). The Montana Department of Administration, Information Services Division (ISD) was named therein as a respondent party. On April 12, 1994 ISD filed a motion to dismiss, alleging that the Commission lacks jurisdiction over ISD.

2. On May 25, 1994 the Commission issued a "Phase I Final Order." Order No. 5778b. In that Order, the Commission procedurally dismissed ISD from Docket No. 94.2.8, but named ISD as a party to a new Commission docket, reserving for consideration all the substantive issues from Docket No. 94.2.8, and not ruling on the jurisdictional issue. Order No. 5778b, Finding of Fact 10 and Ordering Paragraph 2.

3. On June 7, 1994 ISD filed a motion for reconsideration, claiming the Commission could not legally name ISD to another docket without first resolving the question of jurisdiction.

## II. Analysis

4. The question of Commission jurisdiction over ISD is a longstanding one in need of resolution. The Commission has decided to issue a ruling on the jurisdictional issue at this time, without proceeding through an entire separate docket. For the reasons discussed below, the Commission finds that the Commission lacks jurisdiction over ISD's current services (described in ISD's answers to the Commission Questionnaire, filed April 12, 1994) and should therefore be dismissed from further proceedings at this time.

5. In regard to utility services, Commission jurisdiction and authority is statutorily limited to the supervision, regulation, and control of public utilities. See Section 69-3-102, MCA. Therefore, the salient issue is whether ISD is a public utility as defined in Title 69. The term "public utility" is defined in Section 69-3-101, MCA:

The term "public utility", within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter

may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal....

6. The definition in ' 69-3-101, MCA establishes two criteria for determining whether a service provider is a public utility subject to Commission regulatory jurisdiction. The first is organizational, whether the provider is a "corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court ..." The second criteria is service related, whether the provider "own[s], operate[s], or control[s] any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal: ... (f) regulated telecommunications service."

7. ISD argues that it satisfies neither the organizational nor the service criteria. The Commission starts its inquiry by examining the characteristics of ISD's service. ISD maintains that it does not provide service to the public and therefore should not be subject to regulation. Although ' 69-3-101, MCA, does not draw any distinction based on whether service is pro-

vided to the public, it is a recognized tenet of public utility regulation that the service which is subject to regulation is that which is provided to the public.

8. In Lockwood Water Users Assn. v. Anderson, 542 P.2d 1217, 168 Mont. 303 (Mont. 1975), the Montana Supreme Court held that in determining whether a utility is a public utility, the general common law test is whether the utility holds itself out, expressly or impliedly, as engaged in the business of supplying a product or service to the public, as a class, or to any limited portion of it, as distinguished from holding itself out as serving or ready to serve only particular individuals. The Court also cited with approval 64 Am.Jur.2d, Public Utilities, Section 5, p.533, which states:

In the absence of statute, the most important test used in determining whether such an organization or group is in fact a public utility in this respect is the factor of serving or willingness to serve the entire public within the area in which the facilities of the organization are located. If it confines its service to its own stockholders or to members of its own group, and does not serve or hold itself out as willing to serve the public, it is not ordinarily considered a public utility...."

9. Although ' 69-3-101, MCA, is silent on the subject, it clearly appears that in Montana, a public utility is an entity

which provides or offers service to the general public. Cf. sections 69-3-803(3) and 69-3-804, MCA (private telecommunications service does not constitute regulated telecommunications service).

10. The facts before the Commission indicate that ISD does not provide or offer service to the public generally. ISD's statutory mandate is to provide communications services for agencies of state government, political subdivisions and non-profit organizations. See Section 2-17-302, MCA, see also ARM 2.13.101 et seq. ISD therefore lacks the legal authority to provide telecommunications service to the general public. Further, no facts have been presented indicating that ISD is operating beyond its statutory mandate.

11. TRI Touch America, one of the Respondents in the instant Docket, alleges that ISD's provision of service to university students residing in dormitories constitutes service to the public. However, the provisioning of such service appears to be within ISD's mandate and does not constitute service to the general public in the traditional sense. The University System is a political subdivision of the State of Montana and the dormitories are a part of the University System's physical plant. When ISD provides service to dormitories, it is providing

service no different from that provided to any other university or state buildings. The appropriate inquiry is on whose behalf is the service is provided; and, the dormitory services are provided on behalf of the University System, an entity within ISD's statutory mandate.

12. Another policy reason for granting ISD's motion is based upon a general rationale for Commission regulatory authority. That is, the primary purpose of Title 69 of the Montana Code, which establishes rate and service regulation of public utilities, is to regulate monopolies which provide essential services to the public, and which may exert market power to the detriment of their customers. ISD is a state agency established and governed by the dictates of the Montana legislature and the executive branch administration. Because ISD is governed by state officials and employees, the above described rationale -- protection against private monopoly abuse of the public -- is not present in this instance. Therefore, the primary rationale for Commission rate and service regulation is not present with respect to ISD. See generally, ' 1-3-201, MCA (when the reason for a rule ceases, so should the rule itself).

13. In addition, the statutes governing ISD's services contain a number of self-regulating provisions designed to assure

reasonable rates based on costs. ' ' 2-17-302(1)(g), 2-17-304 and 2-17-323(3), MCA. ISD is qualified to appropriately administer these provisions without the assistance or supervision of another state agency (namely, the Commission).

14. Because service is not being offered or provided to the general public, and the basic rationale for rate and service regulation is not present, the Commission concludes that ISD is not a public utility subject to Commission regulation. The Commission reaches this conclusion based on the character of ISD's services and the inapplicability of the policy justifications for utility regulation. The Commission does not reach, in this decision, the question of whether ISD qualifies organizationally as a regulated entity under ' 69-3-101, MCA (i.e. whether a state agency is a "public corporation").

#### CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. ' 69-3-102, MCA.

2. ISD is a not a public utility subject to Commission jurisdiction pursuant to ' 69-3-101, MCA. This conclusion is based upon the services currently provided by ISD, as shown in the record of this Docket, and the reasons stated above.

3. The PSC has provided adequate public notice of all proceedings herein and an opportunity to be heard, to all interested parties in this Docket. Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

ORDER

NOW, THEREFORE, based upon the foregoing, it is hereby ORDERED as follows:

The Department of Administration, Information Services Division is hereby DISMISSED as a Respondent party in this Docket. The Commission has no plans to institute any further proceedings to investigate the regulatory status of ISD at the present time.

Done and Dated this 14th day of November, 1994 by a vote of 5-0.



BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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BOB ANDERSON, Chairman

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BOB ROWE, Vice Chairman

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DAVE FISHER, Commissioner

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NANCY MCCAFFREE, Commissioner

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DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE:       You may be entitled to judicial review in this matter.  
              Judicial review may be obtained by filing a petition  
              for review within thirty (30) days of the service of  
              this order.   Section 2-4-702, MCA.